

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:	)	Chapter 7 Case
	)	Number <u>97-10538</u>
ANTHONY O'NEIL WALFORD	)	
	)	
Debtor	)	
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LAVANEICER A. WALFORD/HILLMAN	)	
	)	
Plaintiff	)	
	)	
vs.	)	Adversary Proceeding
	)	Number <u>97-01026A</u>
ANTHONY O. WALFORD	)	
	)	
Defendant	)	

**ORDER**

Pursuant to notice, trial was held in this adversary proceeding wherein the plaintiff Lavaneicer A. Walford/Hillman (Ms. Hillman) sought a determination of nondischargeability of obligations owed her by Anthony O. Walford (Debtor) arising from a final judgment and decree of total divorce between the parties dated October 17, 1995 in the Superior Court of Columbia County, Georgia. Although the complaint alleges that the debts are nondischargeable

under 11 U.S.C. §523(a) (5) and (15)<sup>1</sup>, the Debtor conceded that under 11 U.S.C. §523(a) (5) his obligations for child support and alimony were not discharged in his underlying Chapter 7 bankruptcy case, including any child support and alimony delinquency owed pre-petition or which accrued post-petition. The parties stipulated at trial that the remaining obligations due Ms. Hillman under the divorce decree were of the type excepted from discharge pursuant to §523(a) (15). The only issue tried was whether the Debtor could establish an exception to the discharge exception under §523(a) (15). The standard of proof for a §523 action, including the establishment of an exception to the discharge exception under §523(a) (15), is by a preponderance of the evidence. See, Grogan v. Gardner, 498 U.S.

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<sup>1</sup>11 U.S.C. §523(a) (5) & 15 provide in pertinent part:

(a) A discharge under section 727 . . . of this title [11] does not discharge an individual debtor from any debt- . . .

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, . . .

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless--

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor . . . or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). The Debtor has carried his burden of proof that he does not have the ability to pay the debt due under the divorce decree from income or property not reasonably necessary to be expended for his and his present family's maintenance and support.

Pursuant to the divorce decree, the Debtor was to pay child support of \$800.00 per month and alimony of \$450.00 per month for a period of 36 months. In the equitable division of property, Ms. Hillman received the marital residence subject to a first mortgage, a 1989 Dodge automobile subject to a security interest by which the automobile was later repossessed, and \$12,000.00 to be paid to her by the Debtor within 24 months of the sale of the former marital residence. Ms. Hillman later sold the residence, netting \$4,000.00, but the Debtor never paid to Ms. Hillman any of the \$12,000.00 owed. The Debtor retained a 1987 BMW automobile and a van, certain personal property, exclusive title to a convenience store known as Walford's Food and Gas and any other business interest owned by him. Additionally, the debtor was to pay the joint credit card indebtedness owed Bank One with a balance of approximately \$2,000.00. On December 16, 1996 the Debtor obtained a modification of his support obligations, reducing his monthly child support payment to \$500.00.

Remaining at issue is the Debtor's ability to pay \$12,000.00 to Ms. Hillman and the balance of the indebtedness owed

Bank One. Determining whether the debtor lacks the ability to pay this debt requires an analysis of the debtor's income and living expenses. Unfortunately, §523(a)(15) provides no guidance for determining whether to analyze a debtor's ability to pay as of the petition date, the date the complaint is filed, the date of trial, or viewing the debtor's future earning potential and debt load in the indefinite future. Not surprisingly, courts are split on this issue. See, Carroll v. Carroll (In re Carroll), 187 B.R. 197, 200 (Bankr. S.D. Ohio 1995) (courts should look at relative positions of the parties on the petition date); Anthony v. Anthony (In re Anthony) 190 B.R. 433, 438 n. 4 (Bankr. N.D. Ala. 1995) (relevant date is the date complaint is filed); Belcher v. Owens (In re Owens) 191 B.R. 669, 674 (Bankr. E.D. Ky. 1996) (relative date is time of trial); Collins v. Florez (In re Florez), 191 B.R. 112, 115 (Bankr. N.D. Ill. 1995) (statute contemplates the debtor's ability to repay the debt over a period of time).<sup>2</sup>

The date on which the bankruptcy petition is filed and the order for relief is entered is the watershed date of a bankruptcy proceeding. As of this date, creditors' rights are fixed (as much as possible), the bankruptcy estate is created, and the value of the debtor's

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<sup>2</sup>Courts interpreting §523(a)(15) have routinely decried the lack of clarity of the statute and the difficulty of implementing it with any degree of satisfaction. Humiston v. Huddelston (In re Huddelston), 194 B.R. 681, 685, n. 8 (Bankr. N.D. Ga. 1996) (citing cases describing §523(a)(15) as "a formidable challenge," "a piece of legislative sausage", and "clearly in need of legislative remediation and clarification").

exemption is determined.

Johnson v. General Motors Acceptance Corp. (In re Johnson), 165 B.R. 524, 528 (S.D. Ga. 1994). Likewise, the analysis under subsections (A) and (B) of §523(a)(15) must turn upon the debtor's income and expenses on the date the petition is filed, as reflected in Schedules I & J. Schedules I & J not only reflect a debtor's financial condition on the date of the petition, but also contemplate the effect of the impending discharge. Schedule J includes those expenses a debtor is paying as of the date of the petition and will carry over post-discharge. Discharged debts are not included. Using the financial condition of a debtor as of the petition filing date for §523(a)(15) exception analysis does not preclude consideration of evidence that the debtor may have manipulated his income or living expenses to establish an inability to pay. The past earning history or living expenses of the debtor may be considered, with the debtor bearing the ultimate burden of proof. Factors to be considered in assessing whether the Debtor's Schedules I & J accurately reflect his income and living expenses are (1) disposable income at the time of trial, (2) presence of more lucrative employment opportunities, (3) any relief of debt expected in the short term, and (4) the extent to which the debtor has made a good faith attempt to obtain employment to satisfy the debt. See, In re Huddelston, 194 B.R. at 688; Straub v. Straub (In re Straub), 192 B.R. 522, 528-29 (Bankr. D. N.D. 1996); Florio v. Florio (In re

Florio), 187 B.R. 654, 657 (Bankr. W.D. Mo. 1995); Hardy v. Hardy (In re Hardy) Ch. 7 No. 95-42178 Adv. No. 96-4004 slip op. at 11 (Bankr. S.D. Ga. Nov. 5, 1996). In analyzing a debtor's ability to pay, the court should consider the income of the debtor set forth in Schedule I plus all income flowing into the debtor's household from all sources, as well as all living expenses of the debtor's household to the extent that the income and expenses are necessary for the support of the debtor and his dependents. See Cleveland v. Cleveland (In re Cleveland), 198 B.R. 394, 399 (Bankr. N.D. Ga. 1996); In re Smither, 194 B.R. 102, (Bankr. W.D. Ky. 1996); Hill v. Hill (In re Hill), 184 B.R. 750, 755 (Bankr. N. D. Ill. 1995).

In this case, the current expenditures of the Debtor as set forth in Schedule J of his petition were not challenged by Ms. Hillman. Schedule J reflects a total monthly expense of \$2,545.00 which includes the \$450.00 monthly alimony obligation due Ms. Hillman which terminated in March 1997 upon her remarriage. Taking this change of circumstance into consideration, the total current monthly expenditure of the Debtor including his monthly child support obligation of \$500.00 is \$2,095.00. This monthly expense covers the living expenses for the Debtor, his current wife, and her two children for which she receives no support. The Debtor's current monthly expenditures are reasonable.

The issue here is whether the Debtor's current income listed in Schedule I is manipulated to reflect an inability to pay

the debts due Ms. Hillman. Schedule I indicates monthly net income into the Debtor's household of \$1,111.24. The Debtor testified that at the time of the bankruptcy filing he was employed as a maintenance mechanic earning \$7.75 per hour. At the time of trial, the Debtor earned \$9.00 per hour. Even taking into consideration this 15% increase in the Debtor's hourly rate and adjusting his monthly disposable income accordingly, his monthly disposable income is approximately \$1,277.93, an amount less than his monthly expenses. The Debtor has made a prima facie showing pursuant to §523(a)(15)(A) that his expenses exceed his income and that he does not have a present ability to pay.

In response, Ms. Hillman introduced into evidence the Debtor's 1989 federal income tax return reflecting regular employment income at the Savannah River Site of approximately \$32,000.00, 1993 federal income tax returns reflecting adjusted gross income of \$80,764.00, 1994 W-2 forms from Walford's Food and Gas of \$42,412.50, and a 1995 personal financial statement issued by the Debtor to First Union National Bank indicating employment income of \$42,500.00. Additionally, the 1995 financial statement reflects an escrow account with Murphy Oil Corp. of \$12,000.00, 3,000 shares of Interactive Television stock with a market value of \$17,000.00, other stocks valued at \$2,000.00 and real estate investments valued at \$25,000.00.

The Debtor's testimony adequately rebutted the evidence of

a substantially higher earning capacity. When the Debtor left his job at the Savannah River Site in 1991, he held a position substantially similar to the position he now holds for a considerably lower wage. The Debtor left the Savannah River Site to take over the family business, Walford's Food and Gas. In the period between 1991 and 1996, the Debtor operated that business and opened an additional business, Tony's Restaurant. Although the Debtor withdrew substantial income from these businesses from 1991 to 1996, both businesses failed and were foreclosed upon by creditors, consuming all of the Debtor's non-bankruptcy exempt assets. The vast majority of the \$155,039.00 unsecured debts listed in his underlying Chapter 7 case arose from the failed businesses, not from the divorce decree. The Debtor lacks an ability to pay Ms. Hillman the \$12,000.00 due her and the balance of the Bank One credit card obligation as required under the divorce decree.<sup>3</sup>

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<sup>3</sup>The exemptions claimed by the Debtor under Schedule C are unchallenged and the property is therefore exempt. Taylor v. Freelan & Kronz, 503 U.S. 1644, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992). I cannot consider the exempt property claimed by the Debtor, to which no creditor objected, as property available for the payment of an obligation excepted from discharge under 11 U.S.C. §523(a)(15). 11 U.S.C. §522(c) provides

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except—

(1) a debt of the kind specified in section 523(a)(1) or 523(a)(5) of this title; or

(2) a debt secured by a lien that is—

(A) (i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of

It is therefore ORDERED that pursuant to 11 U.S.C. 523(a) (5) and by stipulation of the parties the obligation of the Debtor Anthony O'Neil Walford to pay to Lavaneicer A. Walford/Hillman child support currently at the rate of \$500.00 per month together with any delinquency due in this obligation and alimony remaining unpaid under the final judgment and decree of total divorce between the parties entered October 17, 1995 in the Superior Court of Columbia County, Georgia Civil Action File No. RCD 43-95 as amended by order of the Superior Court of Richmond County, Georgia in Civil Action File No. RCD-1943-96 is excepted from the discharge of Anthony O'Neil Walford in his underlying Chapter 7 bankruptcy case No. 97-10538. All other obligations of Anthony O. Walford to Lavaneicer A. Walford are ORDERED discharged in Mr. Walford's Chapter 7 case.

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JOHN S. DALIS

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this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed; or

(3) a debt of a kind specified in section 523(a) (4) or 523(a) (6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution.

CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this \_\_\_\_ day of August, 1997.